No. 02-516

(16)

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents,

and

EBONY PATTERSON, et al.,

Respondents.

On Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

1. Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

PARTIES TO THE PROCEEDING

Petitioners are Jennifer Gratz and Patrick Hamacher. They were plaintiffs in the district court and appellants in the court of appeals. They bring this action on their own behalf and petitioner Hamacher also brings it on behalf of a certified class of similarly situated persons.

Respondents are Lee Bollinger, James J. Duderstadt, and The Board of Regents of the University of Michigan. They were defendants in the district court and appellees in the court of appeals.

The following additional respondents were defendant-intervenors in the district court and appellants in the court of appeals:

Ebony Patterson, Ruben Martinez, Laurent Crenshaw, Karla R. Williams, Larry Brown, Tiffany Hall, Kristen M.J. Harris, Michael Smith, Khyla Craine, Nyah Carmichael, Shanna Dubose, Ebony Davis, Nicole Brewer, Karla Harlin, Brian Harris, Katrina Gipson, Candice B.N. Reynolds, by and through their parents or guardians, Denise Patterson, Moises Martinez, Larry Crenshaw, Harry J. Williams, Patricia Swan-Brown, Karen A. McDonald, Linda A. Harris, Deanna A. Smith, Alice Brennan, Ivy Rene Carmichael, Sarah L. Dubose, Inger Davis, Barbara Dawson, Roy D. Harlin, Wyatt G. Harris, George C. Gipson, Shawn R. Reynolds, and Citizens for Affirmative Action's Preservation.

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OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-55a)[1] denying petitioners' request for complete relief is reported at 122 F. Supp. 2d 811. The decision of the district court (Pet. App. 66a-90a) with respect to the arguments of the intervenor-respondents is reported at 135 F. Supp. 2d 790.

JURISDICTION

The district court entered its order on January 30, 2001, and a judgment on February 9, 2001. The case was docketed in the court of appeals as Nos. 01-1333, 01-1416, 01-1418, and 01-1438. Petitioners filed a petition for certiorari before judgment under this Court's Rule 11 on October 1, 2002. The Court granted the petition as to the first of the questions presented in the petition on December 2, 2002, reported at 123 S. Ct. 602. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

2. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

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[1] "Pet. App." refers to the appendix filed with the petition in this case.

3. 42 U.S.C. § 1981 states in pertinent part:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens. . . .

. . . .

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

I. Plaintiffs/Petitioners

Plaintiffs and petitioners Jennifer Gratz and Patrick Hamacher applied for admission to the respondent University of Michigan's College of Literature, Science & the Arts (hereinafter "University" or "LSA") in 1995 and 1997, respectively. Pet. App. 109a. Both Gratz and Hamacher were initially placed on a "wait-list" and were subsequently denied admission. *Id.*

Ms. Gratz applied with an adjusted grade point average of 3.8,[2] and an ACT score of 25. *Id.* at. 113a. She was notified by letter dated January 19, 1995, that the LSA had "delayed" a final decision on her application until early to mid-April. The letter also informed Gratz that her application was classified as "well qualified, but less competitive than the students who ha[d] been admitted on

[2] Upon receipt of an application, the University recalculated an applicant's high school grade point average based on the applicant's academic courses from tenth and eleventh grades, plus other factors. Pet. App. 111a-12a.

first review." Pet. App. 109a; App. 73. By letter dated April 24, 1995, the University wrote to Ms. Gratz that "all of the applications have now been reviewed and [the University] regret[s] to inform you that we are unable to offer you admission." Pet. App. 109a; App. 75. She accepted an offer for admission into the freshman class of another institution, the University of Michigan at Dearborn, where she enrolled in the fall of 1995 and graduated in 1999. Pet. App. 109a.

Patrick Hamacher applied in 1996 for admission into the fall 1997 freshman class of the LSA. *Id.* at 109a. He applied with an adjusted grade point average of 3.0, and an ACT score of 28. *Id.* at 115a. By letter dated November 19, 1996, the University informed Mr. Hamacher that it "must postpone" a decision on his application until "mid-April." Pet. App. 109a; App. 77. The letter stated further that "[a]lthough your academic credentials are in the qualified range, they are not at the level needed for first review admission" to the LSA. Pet. App. 109a; App. 77. On or about April 8, 1997, the University informed Mr. Hamacher that after further review, it was unable to offer him admission to the LSA. Pet. App. 109a-10a. He accepted admission into another institution, Michigan State University, where he enrolled in the fall of 1997 and graduated in 2001.

II. The University's Admissions Policies and Practices

The University admits that it uses race as a factor in making admissions decisions and that it is the recipient of federal funds. Pet. App. 108a-09a; App. 46. It justifies its use of race as a factor in the admissions process on one ground only: that it serves a "compelling interest in achieving diversity among its student body." Record 78, Cir. App. 314.[3] Admission to the University is selective,

[3] "Cir. App." refers to the Joint Appendix filed by the parties in the Sixth Circuit in this case.

meaning that many more students apply each year than can be admitted, and the University rejects many qualified applicants. Pet. App. 108a. The University has a policy, however, to admit all qualified applicants who are members of one of three select racial minority groups which are considered to be "underrepresented" on the campus: African Americans, Hispanics, and Native Americans. According to a 1995 document authored by the University:

> . . . [M]inority guidelines are set to admit all students who qualify and meet the standards set by the unit liaison with each academic unit, while majority guidelines are set to manager [sic] the number of admissions granted to satisfy the various targets set by the colleges and schools.
>
> . . . .
>
> Thus, the significant difference between our evaluation of underrepresented minority applicants and majority students is the difference between meeting qualifications to predict graduation rather than selecting qualified students one over another due to the large volume of the applicant pool.

App. 80-81.[4]

The University acknowledges that its consideration of race in the admissions process has the effect of admitting virtually every qualified applicant from any of the designated underrepresented minority groups. Pet. App. 111a; Record 78, Cir. App. 355-56. It generally defines a "qualified" applicant to be one who could be expected, on the basis of the information contained in his or her application, to achieve passing grades as a student in the school to which the applicant has applied for admission. Record 78, Cir. App. 331, 383-84.

[4] "App." refers to the Joint Appendix filed with petitioners' brief on the merits.

The University's Office of Undergraduate Admissions ("OUA") oversees and implements the LSA admissions process. OUA uses written guidelines in effect for each academic year. Pet. App. 110a. Admissions counselors are generally expected to make admissions decisions in accord with the guidelines, although there is some discretion to depart from them, and counselors are expected to discuss any departures with a supervisor. *Id.* at 110a; Record 78, Cir. App. 325, 326, 332, 353.

The guidelines for all the years at issue (1995-2000) vary somewhat because, after commencement of the litigation, the University made changes to them. Discussed below first are the guidelines that were in effect for freshman entering classes for 1995 to 1997, when the suit was filed. Following that is a discussion of the guidelines in effect for 1998 to 2000, when the motions for summary judgment were heard and decided. The parties stipulated that the changes in the guidelines over these years were changes in the "mechanics" only and that there was no substantive change in the University's consideration of race. Pet. App. 116a.

A. Admissions Guidelines for 1995-1997

Written guidelines for all LSA classes commencing in 1995, 1996, and 1997 have in common the use of grids or tables that are divided into cells representing different combinations of small ranges of adjusted high school grade point averages and scores on ACT or SAT tests. Pet. App. 112a, 115a. The grade point averages are adjusted first by clerical employees and second by admissions counselors. *Id.* at 111a-12a. The adjustments made by the admissions counselors are based on application of separate written "SCUGA" guidelines, which result in a score on a four-point scale ("GPA 2") that is represented in the tables for each year. The SCUGA guidelines call for addition or subtraction of points based on the quality of an applicant's high school ("S"), strength of curriculum ("C"), unusual circumstances ("U"),

geographic factors ("G"), and alumni relationships ("A"). *Id.* at 111a-12a.

Each cell in the Guidelines tables includes one or more possible actions for consideration by the admissions counselor reviewing an applicant's file. Generally, the guidelines call for action on an application under one of the following categories: admit, reject, delay (for more information), or postpone (wait-list). The guidelines for applicants in 1995 (which included Jennifer Gratz) have four *separate* tables, one for each of the following groups of applicants: in-state non-minority students; out-of-state non-minority students; in-state minority students; and out-of-state minority students. Pet. App. 112a; App. 121-24. For applicants in 1996 and 1997, there are two tables – one for in-state, and one for out-of-state applicants – with minority and non-minority action codes provided for *separately* in each of the individual cells. The top row of each cell represents the guidelines action for white or non-preferred-minority students, and the bottom rows are for "underrepresented" minority applicants and disadvantaged or other students designated as "underrepresented." App. 137-38, 153-54. The addition of a new "SCUGA" factor for underrepresented minority status in 1997 had another consequence: underrepresented minorities, *solely based on their race*, had one-half point (.5) added to their grade point average calculation used in the already discriminatory guidelines tables. App. 111-12.

The guidelines tables commonly call for different courses of action based on race for applicants whose credentials are in the same cell. Generally, the guidelines calling for admission are found in cells representing relatively higher combinations of adjusted grade points ("GPA 2" or "selection index") and test scores than in cells providing for delay, postpone, or rejection. The guidelines reflect that admissions decisions are generally more competitive for out-of-state than in-state applicants. The guidelines also establish that admissions decisions for whites and non-preferred minorities are generally more

selective (requiring higher GPA 2 and test scores for admission) than admission decisions for the "underrepresented" minority applicants. App. 121-24, 137-38, 153-54.[6]

Admissions data illustrate the consequences of the University's two-track admissions policies. Given comparable grades and test scores, the rates of admission for students from the "underrepresented" racial and ethnic groups are generally much higher than the rates for students from the disfavored racial and ethnic groups. In 1995, for example, students from the "underrepresented" minority groups whose grades and test scores placed them in the same cell as Jennifer Gratz (GPA of 3.80-3.99 and ACT of 24-26) had an admission rate of 100%. Record 79, Pl.Exh. GG, Cir. App. 590. For that same combination of grades and test scores a total of 378 "Not Underrepresented" students applied, while only 121 were offered admission. *Id.* The 1996 data convey similar information. Record 79, Pl.Exh. LL, Cir. App. 595; Record 79, Pl.Exh. MM, Cir. App. 596.

Under the 1995-1997 guidelines (and in 1998), the University admitted all qualified applicants from the "underrepresented" minority groups as soon as possible, without deferring or postponing (waitlisting) their applications. Pet. App. 114a-15a. Students from other racial groups, like Jennifer Gratz and Patrick Hamacher, could have their applications deferred or postponed. In a change initiated after commencement of the lawsuit, however, beginning with the 1999 entering class, the University abandoned its approach of "immediately" admitting all qualified "underrepresented" minority students. Instead, admissions counselors were permitted to "flag" for later consideration a file that fell into certain established classifications. *Id.* at 117a. One of those classifications consisted of qualified "underrepresented" minority students meeting a designated selection index score. *Id.*

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[6] In some cases, the guidelines called for automatic rejection based on low grades or test scores. "Underrepresented" minorities, however, were never rejected automatically. Pet. App. 46a.

For years 1995-1998, defendants also "reserved" or "protected" spaces in the class for members of certain groups of students, including students from one of the three "underrepresented" minority groups. *Id.* at 114a-15a. According to the University, "as applicants from a particular group are admitted over the course of the admissions season, the protected spaces reserved for that group are used." Record. 78, Pl.Exh. I, Cir. App. 319. If the pool of qualified applicants from these "underrepresented" minority groups never reached the number of "protected spaces," those slots "opened up" and could be filled by students who were not members of one of the "underrepresented" racial groups. Record 78, Pl.Exh. H, Cir. App. 310.

B. Admissions Guidelines for 1998-2000

The University dispensed with the grids after commencement of this lawsuit. The 1998 guidelines instead used a "selection index" calculated on a variety of factors and scored on a scale of up to 150 points. Pet. App. 33a; App. 173, 181-97. For example, the 1998 guidelines actions to be taken on an application are divided linearly as follows: 100 to 150 points (admit); 95-99 points (admit or postpone); 90-94 points (postpone or admit); 75-89 points (delay or postpone); 74 points and below (delay or reject). App. 173.

The factors used to calculate an applicant's "selection index" under the 1998 guidelines are similar to factors used in prior years. Up to 80 points can be based on high school grade point average (*e.g.*, 40 points for a 2.0 GPA; 60 points for a 3.0; and 80 points for a 4.0). App. 197. Up to 12 points, representing a perfect ACT/SAT score, can be earned for performance on either of the two standardized tests; up to 10 points for quality of school; from 8 to -4 points for strength or weakness of high school curriculum; 10 points for in-state residency; 4 points for alumni relationships; 1 point for an outstanding essay (changed to 3 points beginning in 1999); and 5 points for personal achievement or leadership on the national level. *Id.* Under a "miscellaneous" category, a flat 20 points are added for one of several factors, including an applicant's membership in an

"underrepresented" racial or ethnic minority group. Pet. App. 116a; App. 195, 197.

The University adopted the 1998 guidelines with the intent to admit and enroll the same composition of class as had been admitted and enrolled under the previous guidelines. Pet. App. 34a; App. 277. The change was not intended to increase or decrease the extent to which race and ethnicity was considered in the admissions process from prior years. Record 78, Pl.Exh. J, Cir. App. 339; Record 78, Pl.Exh. K, Cir. App. 365. The University continued to use the 150-point selection index system for years 1999 and 2000 (the year the district court heard the motions for summary judgment). Pet. App. 117a.

III. Proceedings Below

A. The District Court

Plaintiffs commenced this action in October 1997. The district court certified a class of plaintiffs, pursuant to Federal Rule of Civil Procedure 23(b)(2), in an opinion and order filed December 23, 1998. App. 52-71. It also agreed to bifurcate determination of liability and damages, with liability to be decided first. *Id.* at 71. The district court heard the parties' motions for summary judgment on November 16, 2000. In an opinion filed on December 13, 2000, and order filed on January 30, 2001, the district court granted plaintiffs' motion for summary judgment with respect to declaring the University's admissions system for years 1995-1998 unlawful, Pet. App. 3a; granted the University's motion for summary judgment with respect to defendants' 1999 and 2000 admissions systems and plaintiffs' claim for injunctive relief, *id.*, and granted the University's motion for summary judgment on plaintiffs' claims against the individual defendants asserted under 42 U.S.C. § 1983. *Id.* at 4a. In a separate opinion filed on February 26, 2001, *id.* at 66a-90a, the district court rejected the arguments of the intervenors for justifying the University's racial preferences.

In its December 13, 2000, opinion, the district court concluded that diversity was a compelling interest. *Id.* at 14a-32a. In explaining its reasoning, the district court stated that it did "not necessarily agree" with the Ninth Circuit's conclusion in *Smith v. University of Washington, Law Sch.*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) that Justice Powell's analysis was the "narrowest" rationale for the holding of this Court by application of the analysis approved in *Marks v. United States*, 430 U.S. 188, 193 (1977). Pet. App. 17a. Nonetheless, the district court added that it "reache[d] the same ultimate conclusion as the Ninth Circuit, *i.e.*, that under [*Regents of University of California v. Bakke*, 438 U.S. 265 (1978)], diversity constitutes a compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process, albeit through somewhat different reasoning." *Id.* at 17a.

The district court held that the admissions policies for years 1995-1998 were not narrowly tailored, *id.* at 43a-48a, but that the policies in effect in 1999 and 2000 (when the motions for summary judgment were argued) were narrowly tailored, *id.* at 34a-43a. It reached this bifurcated result by concluding that there were substantive differences in the policies for these two time periods. The conclusion contradicted the parties' stipulated fact that the substance of defendants' consideration of race had *not* changed over these years. *Id.* at 116a.

B. The Court of Appeals

All parties appealed some part of the district court's orders and judgments. The district court had entered an order dated January 30, 2001, which both effectuated the decisions made in the December 13, 2000, opinion and made the necessary findings pursuant to 28 U.S.C. § 1292(b). The University filed a petition, and plaintiffs filed a cross-petition, seeking permission to appeal from the January 30, 2001 order. The Sixth Circuit granted both requests for permission to appeal by order dated

March 26, 2001. The two appeals were docketed in the court of appeals as appeal numbers 01-1416 and 01-1418.

Plaintiffs also filed as a matter of right, pursuant to 28 U.S.C. § 1292(a), an appeal from the district court's summary judgment dismissing the plaintiff class's request for injunctive relief. In the same appeal, plaintiffs sought review as a matter of right, pursuant to 28 U.S.C. § 1291, of the district court's final judgment (for which it had directed entry pursuant to Rule 54(b)) dismissing their claims against the individual defendants in their individual capacities on grounds of "qualified immunity." This appeal was docketed as appeal number 01-1333.

A fourth appeal was filed by the intervenors with respect to the decision of the district court rejecting the intervenors' proffered justifications for the University's use of racial preferences in admissions. This appeal was docketed as appeal number 01-1438.

In May 2001, plaintiffs filed in the court of appeals a petition for initial hearing *en banc*, which was eventually granted on October 19, 2001, as was such a petition in *Grutter v. Bollinger*, 288 F.3d 732, 757 (6th Cir.), *cert. granted*, 123 S. Ct. 617 (2002) (No. 02-241). The order is contained in the appendix to plaintiffs' petition for writ of certiorari at Pet. App. 100a-102a, and is reported at 277 F.3d 803. The court of appeals heard argument separately on both cases on December 6, 2001. On May 14, 2002, the court of appeals issued its 5-4 decision in *Grutter v. Bollinger*. In the opinion, the court of appeals stated that it would separately render its decision in this case in a "forthcoming" opinion. *See Grutter v. Bollinger*, 288 F.3d at 735 n.2. On October 1, 2001, because no opinion had been issued in this case, plaintiffs petitioned the Court pursuant to Rule 11 for a writ of certiorari before judgment. That petition was granted on December 2, 2002 with respect to the Question Presented herein. App. 327.

SUMMARY OF ARGUMENT

The University has not met its heavy burden of justifying the racial preferences that it employs in student

admissions. The large, mechanical preferences given for all years at issue to members of specified racial or ethnic groups that the University deems to be "underrepresented" on the campus are not narrowly tailored to achieve a compelling purpose, or any purpose except racial balancing. Although the University purports to employ the preferences on the authority of Justice Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 263 (1978), they cannot be upheld on that basis.

The automatic award of a fixed preference to every member of a specified racial or ethnic group is nothing like what Justice Powell approved in *Bakke*. Indeed, he rejected the systematic award of preferences, based solely on race or ethnicity, that the University's preferences entail. Justice Powell voted to strike down the quota system under consideration in *Bakke*. He made clear that there is more than one way to operate a quota, and the University's system is certainly the functional equivalent of one. This is true for all the multiple forms that the preferences have taken, both before and after commencement of the suit. Their common denominator is the maintenance of a race-based double standard in admissions. The purpose and effect of the University's policies is to admit all "qualified" members from the preferred minority groups, while requiring "qualified" applicants from all other groups to compete for the scarce places remaining in the class. These preferences are certainly more potent than those struck down in *Bakke*, in which many qualified minorities were rejected, and in which the preference was confined to disadvantaged members of the designated minority groups.

Similar considerations demonstrate that the University's preferences are unlawful in light of the factors that the Court's other precedents have considered important to the narrow-tailoring analysis. The preferences are of unlimited duration; the assumption that diversity of viewpoints and perspectives will be achieved by selecting students based on their race amounts to impermissible stereotyping; and race-neutral alternatives to the preferences have not been meaningfully considered.

While intellectual diversity can be obtained through race-neutral means, namely through looking for such diversity directly, rather than through using race as a proxy, an interest in diversity is neither a compelling state interest, nor one suited to narrowly-tailored means consistent with this Court's precedents. The Court did not recognize an interest in diversity as a compelling justification for racial preference in *Bakke*, as only Justice Powell endorsed it as such. His rationale, derived from principles of "academic freedom," finds no support in the Court's cases on that subject.

The Court's precedents subsequent to *Bakke* have in fact rejected some of the premises upon which Justice Powell's rationale would grant discretion to educational institutions to consider race in admissions. These precedents have established standards for judging whether an interest is compelling. They are standards that an interest in diversity cannot possibly pass. The interest has no principled limits, particularly when, as the University argues, the scope of the interest, and the types of diversity to be sought, are subject to the discretion and judgment of those who will employ the preferences. The interest is at least as amorphous and indefinite as other interests rejected as compelling, such as remedying the effects of societal discrimination or providing role models to children. This is so whether or not such interests also produce benefits, educational or otherwise.

The University's unbridled use of race and ethnicity in making admissions decisions belies its claim that it has relied on anything contained in *Bakke* to justify its preferences. It is settled law that race and ethnicity can be used only when necessary to achieve a compelling interest, and then only through narrowly-tailored means. As this and other litigated cases demonstrate, there is no principled, limited, workable way that race and ethnicity can be used to achieve an interest in diversity consistent with constitutional standards.

To justify the use of race and ethnicity as considerations in admissions on the basis that diversity is a compelling interest would be to make a substantial and dramatic break from this Court's articulated equal-protection principles. It would infringe on fundamental rights protected by the Fourteenth Amendment and the other civil rights statutes at issue here.

ARGUMENT

The University of Michigan's Use of Racial Preferences in Undergraduate Admissions Violates the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and 42 U.S.C. § 1981.

> [R]acial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice, and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law – an indispensable condition to a free society – under which all men stand equal and alike in the rights and opportunities secured to them by their government.
>
> **– Brief *Amicus Curiae* of the United States (1952)**[6]
>
> [R]ace is a defining characteristic of American life.
>
> **– Brief of the University of Michigan (1999)**[7]

[6] Brief *Amicus Curiae* of the United States (1952) filed in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *quoted in* 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT 118 (Philip B. Kurland & Gerhard Casper eds. 1975).

[7] Record 81, Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Memorandum in Support of Defendants' Cross-Motion for Summary Judgment (May 3, 1999).

The issues framed by this case present two fundamentally different visions of our country and hold out opposing prospects for its future. One seeks to realize "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989). The other is based on a view not only that "race matters,"[8] but also that race *should* matter in the government's treatment of individuals, now and indefinitely into the future. The "lesson of the great decisions" of this Court is to embrace the first of these visions and to resolutely repudiate the latter. *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975).[9] Petitioners return to this lesson in asking the Court to invalidate the University's program of racial preferences.

The University has repeatedly made the remarkable assertion that we are "as racially separate today as . . . before *Brown v. Board of Education*, the Civil Rights Act of 1964 and the Voting Rights Act of 1965."[10] Although the statement is certainly false, it should not be surprising that race continues to divide us when official government action tolerates, sponsors, and perpetuates enduring

[8] *See, e.g.*, "Questions and Answers about the Lawsuit Against the University of Michigan Law School," http://www.law.umich.edu/newsandinfo/lawsuit/qanda.htm.

[9] *See also* William Van Alstyne, *Rites of Passage: Race, The Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 797 (1979) ("This judicial resolve to remove the race line from our public life has been the most credible and admirable position for the Court steadfastly to maintain. . . . ").

[10] Final Brief of Appellees 36 (July 31, 2001).

division and different treatment based on race. To the extent that the University's pessimistic view that "your skin color determines . . . where you live, where you go to work, and with whom you work"[11] is true, it is a reason for government to rededicate itself to a commitment to the principle of non-discrimination. It is certainly *not* a reason or justification for government itself to make decisions about individuals because of their race or "skin color."

It is because racial and ethnic classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), that we can "tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), and that the means employed must also be necessary, *i.e.*, "narrowly tailored" to achieve the compelling interest. *Id.*

Governmental commitment to the principle of non-discrimination does not mean that government is disabled from recognizing identified race discrimination and acting to remedy it. Accordingly, the Court has recognized a compelling interest in remedying such discrimination through narrowly-drawn means. *Id.* at 227; *J.A. Croson Co.*, 488 U.S. at 509. But that is an interest entirely different from one that values an individual more or less than another because of his or her race or ethnicity. The University does the latter when it uses race and ethnicity as factors in deciding who among the many individuals applying for admission receives one of the limited spaces in the class. It has never justified its racial preferences on the grounds of remedying past or present identified discrimination. *See* Pet. App. 74a. Instead, its stated purpose for considering race in the admissions process is

[11] Statement of current University of Michigan President Mary Sue Coleman, http://www.umich.edu/%7Enewsinfo/Releases/2002/Dec02/r120202.html#coleman.

the achievement of "diversity" in the composition of the class.

Inherent in the concept is the notion that one student will make a greater or lesser contribution to the class because of his or her race or ethnicity. If such a view is accepted, it must be because one can make certain legitimate and relevant assumptions about an individual based on racial and ethnic characteristics. This view should not be tolerated as a justification for racial preferences. *See Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 615 (1990) (O'Connor, J., dissenting) (noting that "the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications *apart from generalizations impermissibly equating race with thoughts and behavior*") (emphasis added). *Cf. Miller v. Johnson,* 515 U.S. 900, 912 (1995) (noting that race-based assignment of voters may "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to criterion barred to the Government by history and the Constitution") (quoting *Metro Broadcasting, Inc.*, 497 U.S. at 604 (opinion of O'Connor, J., dissenting)).

The interest in diversity that the University asserts in justification of its racial preferences is based on stereotypes. It looks to use race as a proxy for genuine intellectual diversity that can be found directly in the different outlooks, backgrounds, experiences, and talents of each unique individual. It is not an interest that the Court has ever recognized as a compelling governmental justification for racial preferences. The lone opinion of Justice Powell in *Regents of University of California v. Bakke,* 438 U.S. 265 (1978), did not establish for the Court a recognized compelling state interest in diversity. The Court's subsequent precedents furnish standards against which the claims for the diversity interest can be measured. What emerges from an analysis of these cases is the conclusion that diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means. Because the interest in diversity

is not tied to remedying identified violations of the equality guarantee, it is limited only by the standardless discretion of educational institutions, each making its own choices about the kind of racial and ethnic mix, or diversity, that it desires. *See, e.g.*, *Grutter v. Bollinger*, 288 F.3d 732, 751 (6th Cir. 2002) (noting that "some degree of deference must be accorded to the educational judgment [of schools] in its determination of which groups to target").

The University's use of racial preferences is a case study in their dangers and the reasons why they cannot be constitutionally justified by an interest in diversity. The preferences treat applicants not as unique human beings, but instead as members of discrete racial and ethnic enclaves. Bare racial and ethnic status is enough to qualify or disqualify an applicant for substantially different treatment and outcomes in the admissions process.

Moreover, the University's actual use of racial preferences on a rationale never accepted by the Court as compelling does not remotely resemble the kind of consideration of race and ethnicity that Justice Powell endorsed in *Bakke*. Far from relying on Justice Powell's approach, the University has ignored and even repudiated it. In a number of respects, it operates the kind of "two-track" or "dual" admission system, *Bakke*, 438 U.S. at 315 (opinion of Powell, J.), that Justice Powell's analysis and the result in *Bakke* forbid. The means employed by the University also embody clear departures from principles laid down by the Court's more recent precedents.

Having failed to meet its heavy burden of proving that its use of racial preferences is narrowly tailored to achieving a compelling state interest, the University has violated plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment and Title VI, 42 U.S.C. § 2000d.[12]

[12] The Court has held that Title VI prohibits only that conduct prohibited by the Equal Protection Clause, so that the same strict-scrutiny analysis applies to plaintiffs' Title VI claims. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 285-86 (2001).

The University's preferences also violate plaintiffs' rights under 42 U.S.C. § 1981, which forbids discrimination on the basis of race in contracting, including contracts for educational services. *See* discussion *infra* at 49.

I. The University's Use of Racial Preferences Demonstrates Defiant Resistance to This Court's Precedents.

In defending its rigid, mechanical racial preferences on the asserted ground that they comport with Justice Powell's strictures on the use of race in admissions as set forth in his opinion in *Bakke*, the University in fact mocks that opinion. What Justice Powell *alone* wrote about academic freedom and diversity as justifications for the consideration of race in admissions processes, the University reads broadly as an endorsement by the Court. Yet what a *majority* actually decided with respect to the admissions program *struck down* in *Bakke*, the University treats as if the analysis was good for that case only. The means employed by the University through its use of racial preferences are manifestly unlawful under *Bakke* as well as the Court's subsequent precedents. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Because the University has the temerity to defend its egregious preferences on the basis of Justice Powell's opinion in *Bakke*, it is instructive to begin there.

A. In *Bakke*, the "special admissions program" of the University of California Medical School at Davis ("Davis") reserved 16% of the places in the first-year class for members of specified racial and ethnic minorities who were educationally or economically disadvantaged. *Bakke*, 438 U.S. at 275 (opinion of Powell, J.). Like the University's admissions system, the Davis program operated on a "rolling" admissions basis, *i.e.*, applications were acted on throughout the admissions season. *Id.* Also like the University, Davis reserved places in the class only for "qualified" members of the designated minority racial groups. Many more minority students applied for the program than there were available spaces, and most

minority applicants were rejected under both the special and regular admissions programs. *Id.* at 275-76 & n.5. The program was also "flexible" insofar as there was no "floor" or "ceiling" on the total number of minority applicants to be admitted. *Id.* at 288 n.26. That is, Davis did not use all the reserved seats for disadvantaged minority students if there was an insufficient number of such applicants who qualified. *Id.* Five Justices, including Justice Powell, held that the Davis program unlawfully considered race in the admissions process. *Id.* at 320 (opinion of Powell, J.); *id.* at 421 (opinion of Stevens, J., joined by Burger, C.J., Stewart, and Rehnquist, JJ.). Another group of five Justices, also including Justice Powell, reversed the judgment of the California Supreme Court enjoining Davis from using race under any circumstances. *Id.* at 320 (opinion of Powell, J.); *id.* at 326 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.). No one theory, though, explained for what purposes race could be used.

Justice Powell's vote to invalidate the Davis program made for a majority since four other Justices in *Bakke* decided on different grounds that race could not be considered in the admissions process. Because Justice Powell's analysis allowed for some consideration of race, what is *prohibited* in the consideration of race under his analysis is prohibited by a majority of the Court in *Bakke*. This is so independent of any assessment about whether his articulation of *permissible* uses of race states a rationale for a holding of the Court on the basis of a differently constituted majority.

Although the Davis program involved the "reservation of a specified number" of spaces in the class for disadvantaged members of designated racial and ethnic minorities, Justice Powell's discussion of the *limitations* on the use of race was not confined to such programs. In approving of the use of race as a "plus" factor to achieve the kind of diversity that he believed was a legitimate goal, *id.* at 317, Justice Powell made clear that the kind of program he might approve was one in which the race or ethnicity of an applicant would be (in Justice Powell's formulation)

"weighed fairly and competitively" along with other factors. *Id.* at 318.

Justice Powell repeatedly made the point that in assembling a diverse or heterogenous student body, race or ethnicity was a factor that could be considered on an individualized, case-by-case basis, rather than in a systematic, generalized fashion. Thus, he reasoned that "race or ethnic background may be deemed a 'plus' in a *particular* applicant's file. . . . The file of a *particular* black applicant may be examined for his potential contribution to diversity without the factor of race being decisive." *Id.* at 317 (emphasis added).

While the Davis formal quota was unlawful under these principles, there are a number of ways in which the University's preferences are even more egregious than those of the Davis program. The University grants a large preference for race and ethnicity automatically and mechanically. The preference requires no showing other than membership in one of the preferred racial or ethnic groups. This is true for all years at issue. Thus, for example, in years 1995-1997, having a specified racial or ethnic identity (African American, Hispanic, or Native American) was alone sufficient ground for having admissions decisions made under written guidelines separate from, and generally less selective than, guidelines applicable to all other races and ethnicities. Beginning with the entering class in 1998, mere possession of the specified racial or ethnic status has been enough to entitle an applicant automatically to 20 points out of a total of 150 (with 95 to 100 points generally sufficient for admission). Thus, for example, two students who each earn 75 to 80 points before the consideration of race can expect to have dramatically different admissions outcomes *because of race* if only one of them is an "underrepresented" minority. The existence of a "two-track" system could not be more apparent.

The Davis program, in contrast, limited the preference, *i.e.*, eligibility for consideration in its special admissions program, to "economically and/or educationally

disadvantaged" members of the specified minority groups. *Id.* at 274 & n.4. Indeed, Justice Brennan and those Justices who joined his opinion, found it significant that Davis did not "equate minority status with disadvantage." *Id.* at 377 (opinion of Brennan, J.). The rote granting of the preference is also the antithesis of the "individualized," and "case-by-case" basis on which Justice Powell thought an institution could decide that "race or ethnic background may be deemed a 'plus' in a *particular* applicant's file." *Id.* at 317, 319 n.53 (opinion of Powell, J.) (emphasis added). Under its system of preferences, the University does not need to know *anything* about an applicant – not his or her background, interests, experiences, achievements, academic or other credentials – other than race and ethnicity before awarding the flat 20 points for those characteristics.[13] Hence, the University's racial and ethnic preferences are unlawful under *any* of the rationales articulated in *Bakke*.

Another respect in which the University's preferences are far more extensive and sweeping (and hence less narrowly tailored) than those invalidated in *Bakke* is that the purpose and effect of the University's preferences is to admit all "qualified" applicants from the designated racial and ethnic groups, while "qualified" students of all other races must compete for the limited seats in the class. App. 80-81; Pet. App. 46a. Like the formal quota in *Bakke*, the

[13] In its brief in the court of appeals, the University crystallized the nature of its systematic, rather than particularized, case-by-case, consideration of race: "To enroll meaningful numbers of minorities, *every* underrepresented minority receives a 'plus' for race." Final Brief of Appellees 55 n.32 (July 31, 2001) (emphasis added). The University has thus inverted the Constitution's "'command that the Government must treat citizens "as individuals, not 'as simply components of a racial . . . class.'"'" *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Metro Broadcasting, Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting) (quoting *Arizona Governing Comm. For Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983))).

dual standard employed by the University insulates members of the preferred racial and ethnic groups from competition from members of the disfavored racial groups. If admissions standards are lowered for some racial and ethnic groups so that merely being "qualified" virtually assures admission, then in no true sense can it be said that these students compete for admission against *anyone*, much less against students from other racial and ethnic groups. In this feature, the University's preference can be said to constitute a form of a 100% quota, worse than the Davis quota, which was capped not by the total number of qualified minorities who applied, but by the 16 reserved spaces in the class. *See Metro Broadcasting, Inc.*, 497 U.S. at 630 (O'Connor, J., dissenting) ("There is no more rigid quota than a 100% set-aside.").

In the district court, the University sought to limit the prohibitions of *Bakke* to "fixed" or "rigid" quotas or programs in which "unqualified" students were admitted as a result of the preferences. Record 81, Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Memorandum in Support of Defendants' Cross-Motion for Summary Judgment 39-47 (May 3, 1999). Of course, *Bakke* did not even present the second issue for consideration; the program was struck down despite the fact that only "qualified" applicants were eligible for admission under the special admissions program. *Bakke*, 438 U.S. at 288-89 & n.26 (opinion of Powell, J.). The University's program of preferences is not saved, therefore, merely by establishing that it only admits "qualified" applicants through use of its preferences. This attribute becomes particularly meaningless in light of the highly competitive nature of the admissions program for all other students, for whom being merely "qualified" is not a sufficient condition for admission.

In trying to limit *Bakke* to prohibiting only "fixed" or "rigid" quotas, the University ignores what Justice Powell actually wrote. A system of racial preferences that "operate[d] as a cover for the functional equivalent of a quota" cannot withstand scrutiny. *Baake*, 438 U.S. at 318. This is the only result that makes any sense unless questions of

constitutional violations are to be reduced to an exercise in formalism. Among the things that Justice Powell condemned about the Davis quota was that it set up a race-based "two-track" or "dual admissions" program, in which "simple ethnic diversity" provided the criteria for the dividing line between the two systems. There is more than one way to accomplish those illegitimate objectives, and the University demonstrates that there are many.

The University's racial preferences are quite literally as well as functionally "two-track" or "dual." The University's employment of *separate* standards of admission for the "underrepresented" minorities and all other groups is the *sine qua non* of a dual system. It makes no difference whether the substantive separateness is reflected tangibly, as on separate pages of the race-based grids in use for 1995, or visually, as when the different guidelines were combined on the same page (1996-1997). The inherent separateness continued, moreover, with the adoption of the 150-point selection-index system beginning with the 1998 class. Indeed, the selection index was statistically designed by the University so that it "simply captured the same outcomes produced by the prior [grid] system." Record 81, Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Memorandum in Support of Defendants' Cross-Motion for Summary Judgment at 20 (May 3, 1999); *see also* Pet. App. 34a; App. 277. It would again be a triumph of form over substance to find a constitutionally significant distinction between the systems operated by Davis and the University in that the former accomplished its purposes through a separate admissions committee. Separate admissions committees are simply unnecessary when separate admissions standards are employed instead. For adherence to constitutional standards to turn on such manipulations would be pure farce. It is untenable, therefore, to conclude both that grids are impermissible and that the selection index derived from the grids is not.

Accordingly, the district court was certainly correct in concluding that the admissions systems for years 1995-1998 were impermissible. But it was wrong to imply that a

dispositive difference exists between those years and 1999 and 2000 because of the use in the earlier years of reserved seats and formally segregated waiting lists. Both are indeed egregious practices, which the University still steadfastly defends. By themselves, they would justify striking down the policies in effect during the years when they were employed. The changes in the 1999 and 2000 admissions program cannot, however, justify the district court's conclusion that those programs are lawful. The programs maintain the same rigid racial and ethnic categories for the preference as the earlier years. The award of preference through 20 points added for race and ethnicity is just as automatic and mechanical as when the same award of points was made in 1998 and when separate admissions outcomes were plotted on "grids" in 1995, 1996, and 1997. The large number of points awarded for racial and ethnic status has remained unchanged, and there have been no significant changes in relative size of the point-based preference. Thus, the 20-point award remains the equivalent of a full grade point on the scale, effectively transforming by University fiat a "B" student into an "A" student for purposes of the admissions decision. It is more than would be assigned to a student who achieved a *perfect* ACT or SAT score and who also received points for outstanding "personal achievement" or "leadership service." Whatever it means for race or ethnicity to be considered "competitively" or "weighed fairly" in the admissions process, *Bakke*, 438 U.S. at 318 (opinion of Powell, J.), it certainly cannot mean this.

The district court expressed the view that there was nothing wrong with the University's award of 20 points because points were awarded for other factors as well. Pet. App. 39a. The argument has no force for several reasons. It recognizes no limit on the size of the preference relative to other factors that receive points, thus nullifying whatever Justice Powell meant when he wrote about race and ethnicity being "weighed fairly" and "competitively." It also ignores the fact that the points in the selection index, including the 20 points for race, were chosen for a reason – to "admit the same class as if using [the] old [grid] method."

App. 277. The University has simply demonstrated what Justice Brennan accurately perceived:

> There is no sensible, and certainly no constitutional, distinction between, for example, *adding a set number of points* to the admission rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done [at Davis].

Bakke, 438 U.S. at 378 (opinion of Brennan, J.) (emphasis added). Justice Powell implicitly acknowledged that circumstances could arise in which Justice Brennan's view was correct, *i.e.*, that a university "would operate" its admissions policy as a "cover for the functional equivalent of a quota system." *Id.* at 318 (opinion of Powell, J.). He just did not believe courts should assume that educational institutions would act in such a manner. In this case, the undisputed evidence *proves* that the University has so acted.

As Justice Powell explained, a "two-track" race-based system does not become legitimate by expanding it into a "multi-track program." *Id.* at 315. By the same reasoning, a point-based admissions system like the University's, which can effectively achieve the same results as a formal race quota, is no less effective as such merely because it awards points for other factors as well. So the University's large and statistically determined preference cannot be successfully defended on the ground that race is not the *only* factor that receives consideration.

Justice Powell described the Davis special admissions program as one impermissibly "focused *solely* on ethnic diversity." *Id.* Notably, he applied this description to the *special admissions program*, not to admissions as a whole. Moreover, he described it so even though the special admissions program was limited to *disadvantaged* minorities, and then only to those disadvantaged minorities who were "qualified," meaning Davis also paid some attention

to academic criteria, such as grades and test scores. Indeed, applications to the special admissions program were rated "in a fashion similar to that used by the regular committee," which considered the "candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other *biographical* data." *Id.* at 274-75 (emphasis added).

Compared to the Davis special admissions program, the University's system of racial and ethnic preferences is no less focused "solely" on race and ethnicity. The University's racial and ethnic preferences are *purely* defined by race and ethnicity, and this is no less true simply because the University weighs other factors in the admission process, as did Davis, both for "underrepresented" minority applicants and all other students. Each among the multiplicity of these preferences employed over the years has been designed to achieve one thing only: "simple ethnic diversity." *Id.* at 315. This is true for the complete litany: the articulated double standard for "qualified" students from the designated minority groups versus "qualified" students from other groups; the grids; the half-point added on the basis of race to the grade point calculation in 1997; the "protected" spaces in the class, the segregated waiting lists, the 20-point selection-index award, and the eligibility on the basis of race and ethnicity for "flagging" in the wait-list pool. To Justice Powell, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake . . . [which] the Constitution forbids." *Id.* at 307. The University's regime of preferences defined exclusively on the basis of race and ethnicity do just that.

B.1. The unlawfulness of the University's racial preferences for all years is manifest also when viewed in light of the traditional factors that this Court has looked to for assessing whether a program of racial preferences is narrowly tailored to achieve a compelling interest. *See, e.g., J.A. Croson Co.*, 488 U.S. at 507-08; *United States v.*

Paradise, 480 U.S. 149, 171 (1987). The preferences are of unlimited duration. The University has provided no termination date, and it offers no standards for judging when the preferences should come to an end. A consistent thread running throughout the Court's precedents on race-based means is the insistence that they be *temporary* departures from the rule of equal treatment. *See, e.g., J.A. Croson Co.*, 488 U.S. at 510 ("Proper findings . . . defin[ing] both the scope of the injury and the extent of the remedy . . . serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.").

Even for preferences subject to less exacting review than demanded for race-based classifications under the Equal Protection Clause, the Court has emphasized the importance of the temporary nature of the preferences. *See, e.g., United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) (Title VII) ("Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 618 (1987) (gender discrimination) ("[a]gency's express commitment to 'attain' a balanced work force" ensures that plan will be of limited duration). Because the University's preferences must satisfy the higher and most exacting standard imposed by the Fourteenth Amendment, it is manifest, *a fortiori*, that the absence of temporal limits for the University's racial and ethnic preferences is fatal to their constitutionality.

2. There is also no demonstrated relationship or closeness of fit of means to ends. Although the asserted purpose of the preferences is to achieve the purported educational benefits of diversity, nowhere has the University met its burden of demonstrating how much diversity is necessary to reach the "critical mass" that achieves those benefits, or how much of a preference (*e.g.*, how many points on the selection index) must be given to reach the undefined level of diversity or critical mass. Nowhere does the University demonstrate what the marginal

benefits of increased diversity are compared to what these benefits would be in a system that did not employ racial preferences. *See, e.g., Grutter v. Bollinger*, 288 F.3d at 803-08 (Boggs, J., dissenting). The absence of evidence on these points is not surprising given that the preferences cannot be said to be reasonably related to any goal other than maximizing the presence in the class (admitting virtually all "qualified" applicants) from the groups singled out for preferential treatment. The focus on the three groups deemed by the University to be "underrepresented" on the campus is indistinguishable from "outright racial balancing." *J.A. Croson Co.*, 488 U.S. at 507; *see also Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998) (invalidating racial preferences in assignment of students to public middle schools) ("Underrepresentation is merely racial balancing in disguise – another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions."); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 352 (D.C. Cir. 1998) (invalidating FCC regulations imposing race-based diversity obligations on license holders) ("The very term 'underrepresentation' necessarily implies that if such a situation exists, the station is behaving in a manner that falls short of the desired outcome.").

The poor fit of means to ends is also shown in the grant of preferences on mere showing of an applicant's racial or ethnic status, while the asserted benefits of the diversity objective are found in the background, experiences, and outlooks brought to the University by members of the "underrepresented" groups. The University uses race as a "proxy" for the "views that it believes to be underrepresented" in the student body. *Metro Broadcasting, Inc.*, 497 U.S. at 621 (O'Connor, J., dissenting). The preferences "directly equate race with belief and behavior, for they establish race as a necessary and sufficient condition for securing the preference." *Id.* at 618. The assumption that the students from particular racial and ethnic groups will bring to the school viewpoints, experiences, ideas, and perspectives that the University considers unique to

them merely on account of their membership in a racial or ethnic category is an offensive stereotype. The "corollary" to the University's notion of diversity "is plain: Individuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity." *Id.* at 619.

3. A system of racial preferences like the University's that automatically and mechanically awards large preferences cannot plausibly by described as "flexible." *Paradise*, 480 U.S. at 171. The Eleventh Circuit reached the same conclusion in striking down on narrow-tailoring grounds similar preferences in effect at the University of Georgia. *See Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234, 1254-57 (11th Cir. 2001) ("This rigid, mechanical approach to considering race is itself incompatible with the need for flexibility in the admissions process.").

4. The University also failed in its burden of demonstrating that it has considered race-neutral alternatives. *Paradise*, 480 U.S. at 171. The district court accepted the University's arguments about why it should not have to employ race-neutral alternatives, Pet. App. 40a-43a, but failed to address whether it had given consideration to alternatives. For example, it relied on the opinions of one of the University's litigation experts, who testified about the experiences at the University of Texas. *Id.* at 41a-42a. This was hardly evidence sufficient to entitle the University to summary judgment on the consideration of race-neutral alternatives, with all reasonable inferences to be drawn in favor of plaintiffs, especially since the evidence was not even from those actually charged with formulating the admissions policies. Moreover, citing to the size of the applicant pool and differentials in test scores among racial groups, *id.* at 40a-41a, merely begs the question of whether the University has considered making changes to its admissions policies that achieve the diversity it seeks through race-neutral means.

5. Finally, the impact on parties is certainly great, *Paradise*, 480 U.S. at 171, as the race-based double standard in admissions acts to exclude many applicants because of their race. The harmful effect of the preferences is not mitigated, moreover, by an argument that removal of the preferences would have "only a small positive effect on . . . [the] probability of admission" for students from the disfavored races. The same was true in *Bakke*: invalidating the Davis program opened up only 16 spaces for the hundreds or more of competing applicants. *Bakke*, 438 U.S. at 273 & n.2.

II. "Academic Freedom" and "Diversity" Are Not Compelling Interests Justifying Racial Preferences.

A. Justice Powell's singular opinion in *Bakke* did not establish for the Court a rationale that interests in "academic freedom" or "diversity" are compelling ones justifying racial preferences in admissions. The joinder in Part V-C of his opinion by Justices Brennan, White, Marshall, and Blackmun did not make for such a majority because that part of the opinion says nothing about diversity or academic freedom. There is nothing remarkable, moreover, about the decision of those five Justices reversing the judgment of the state court's blanket prohibition of *any* consideration of race in admissions. Such a judgment and injunction was arguably too broad because race and ethnicity may constitutionally, at least, be considered to achieve a *compelling interest* through *narrowly-tailored* means. But Part V-C does not address what those compelling interests are, and the fractured opinions of the Court cannot support a conclusion that there was agreement among a majority of the Justices on what interests would be compelling.

The district court suggested that the conclusion that Justice Powell's diversity rationale had the endorsement of a majority of the Justices in *Bakke* can be supported by "Justice Brennan's silence" on the subject in his separate opinion. Pet. App. 18a. But this is not so. It is at least

equally likely that remaining silent, especially while also writing separately, indicates the opposite. In any event, surely a rationale for the Court can be reasonably deduced only from what the opinions of the Justices actually contain, not from speculation about what a Justice "would have embraced." *Id.* (quoting *Smith v. University of Washington Law School*, 233 F.3d 1188, 1200 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001)). What Justice Brennan's opinion contains is language indicating that his support for the use of race and ethnicity in admissions was tied to remedying the lingering effects of societal discrimination. *See Bakke*, 438 U.S. at 324-26, n.1 (opinion of Brennan, J.). Indeed, he defined the "central meaning" of the different opinions in the case to be that government "may take race into account . . . to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." *Id.* at 325.

The principles articulated by this Court in *Marks v. United States*, 430 U.S. 188 (1977), cannot be used to divine a rationale for the constitutional consideration of race in the various *Bakke* opinions. The analyses of Justices Powell and Brennan are simply too different to find a common denominator between the diversity and remedial rationales.[14] The disagreement in the lower courts on whether the *Marks* analysis yields an answer on whether there is a majority rationale to be found in the *Bakke* opinions on the constitutional use of race is just further

[14] There is a common denominator in the two opinions on the remedial rationales for the consideration of race. Clearly, Justice Powell's rationale, tied to remedying identified discrimination, *Bakke*, 438 U.S. at 307 (opinion of Powell, J.), is narrower than Justice Brennan's rationale, which justifies the consideration of race to remedy societal discrimination, *id.* at 324-26 (opinion of Brennan, J.). Read in such a fashion, the opinions in *Bakke* are consistent with Court's subsequent precedents. *See, e.g., J.A. Croson Co.*, 488 U.S. at 504-06, 509.

evidence that it is "not useful" to pursue the analysis. *Nichols v. United States*, 511 U.S. 738 (1994). There are indications that the Court agrees. In *Adarand Constructors, Inc.*, 515 U.S. at 218, five members of the current Court agreed that "*Bakke* did not produce an opinion for the Court." The other four Justices joined in expressing the same sentiment in *Alexander v. Sandoval*, 532 U.S. 275, 308 n.15 (2001) (Stevens, J., dissenting, joined by Souter, Ginsburg, Breyer, JJ.) (noting that the five Justices in *Bakke* who voted to overturn the injunction imposed by the lower courts "divided over the application of the Equal Protection Clause – and by extension Title VI – to affirmative action cases" and that "[t]herefore, it is somewhat strange to treat the opinions of those five Justices in *Bakke* as constituting a majority for any particular substantive interpretation of Title VI").

What remains is the need to independently ascertain whether the rationale articulated by Justice Powell can support his conclusion that diversity is a compelling interest justifying racial preferences in admissions, and to determine whether the Court's subsequent precedents cast light on the issue. As discussed below, these modes of analyses demonstrate that the University's use of racial preferences cannot be justified on an interest in promoting "diversity."

B. Justice Powell articulated a compelling interest in diversity as an incident to a First Amendment right of academic freedom possessed by educational institutions. The issues at stake in the "academic freedom" cases cited by Justice Powell in support of his analysis in *Bakke*, however, had nothing to do with what criterion an educational institution might employ in selecting a student body. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), concerned a criminal contempt citation given to a professor who declined to answer questions about his classroom lectures and political affiliations propounded to him by the state's attorney general. Similarly, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), involved a state statute requiring state-employed professors to sign oaths satisfying the state that a teacher employed by it was not a "subversive."

In both cases, the Court invalidated the action taken against the professors as impermissible intrusions on their First Amendment rights. The cases plainly implicated rights of *intellectual* freedom, and they contain testaments to the importance in a free society of keeping a commitment to the openness to ideas – to academic freedom – that is essential to the character of university communities.

It was to one of the concurring opinions in *Sweezy* that Justice Powell looked for some direct connection between that case and *Bakke*. Justice Frankfurter had quoted in *Sweezy* a statement authored by besieged proponents of the "open" universities of South Africa. Their statement identified the "four essential freedoms" of a university to be the right to "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy*, 354 U.S. at 263 (opinion of Frankfurter, J., concurring in the result) (quoting THE OPEN UNIVERSITIES OF SOUTH AFRICA 10-12 (a statement of a conference of senior scholars from the University of Cape Town and the University of Witwaterstrand)).

It would be ironic and tragic if an eloquent statement intended as a plea against racial exclusion at university communities becomes instead a clarion call in service of the *opposite* proposition. None of the Court's precedents stand for the principle that "academic freedom" encompasses the right to give any consideration to race or ethnicity as a reason for admitting or excluding students. It is inherent in the "lesson of the great decisions of the Court," that the principle is an intolerable one. BICKEL, *supra*, at 133. Indeed, the actual outcomes in a number of the Court's cases constitute at least an implicit rejection of the notion that asserted "academic" justifications can make racial discrimination tolerable by educational institutions. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 173-75 (1976) (invalidating under 42 U.S.C. § 1981 the racially discriminatory admissions policies of private school); *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983) (upholding IRS revocation of tax-exempt status

of two universities based on their racially discriminatory policies). *Cf. University of Pennslyvania v. E.E.O.C.*, 493 U.S. 182, 197-202 (1990) (rejecting argument of university that its right to academic freedom protected from disclosure peer review materials relating to the tenure process for former faculty member who alleged discrimination on the basis of race and sex) ("In our view, petitioner's reliance on the so-called academic-freedom cases is somewhat misplaced. In those cases [*e.g., Sweezy* and *Keyishian*] government was attempting to control or direct the *content* of the speech engaged in by the university or those affiliated with it.").

Even if not expressly articulated as such, an interest in furnishing role models to minority children by employing minority teachers is a classic fit with the academic freedom model. It is an interest that directly implicates one of the "four essential freedoms" inherent in academic freedom: the right to determine "who may teach." *Sweezy*, 354 U.S. at 263 (opinion of Frankfurter, J., concurring in the result). The use of race as a factor in choosing role model teachers is unquestionably one made on asserted "academic grounds." *Id.* Teachers *teach,* and certainly the reason for offering a teacher as any kind of a role model is to produce some *educational benefit* for the students taught. Yet laudable as the interest is, it is not one that can be a compelling interest justifying racial preferences in the employment of teachers. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 266, 276 (1986) (plurality opinion) (rejecting role model theory); *id.* at 288 (opinion of O'Connor, J., concurring in part and concurring in the judgment) (rejecting role model theory). *See also J.A. Croson Co.*, 488 U.S. at 497-98 (holding that an interest in remedying lingering effects of societal discrimination had the same fatal defects as the "role model" theory employed in *Wygant*).

Grounding a right to practice race discrimination on "academic freedom" principles would have dangerous and far-reaching consequences. It entails opening the door to racial considerations in student admissions or faculty

appointments whenever doing so is based on the kind of "speculation, experiment, and creation," *Sweezy*, 354 U.S. at 263 (opinion of Frankfurter, J., concurring in the result), that is at the heart of academic inquiry and judgments. Any principled and genuine acceptance of academic freedom as an exception to the requirements of the Fourteenth Amendment would have to recognize that the number of ways in which race might be a factor in admissions is limited only by the number of academic theories that might today or someday justify such consideration. If it could be shown that an educational theory supported the education of individuals in racially homogenous groups, a seriously recognized compelling interest in academic freedom as a justification for racial preferences would logically have to permit policies designed to further that end. *See Grutter*, 288 F.3d at 805 n.37 (Boggs, J., dissenting) (noting that at the time of *Brown v. Board of Education* "there were certainly researchers with academic degrees who argued that segregated education would provide greater educational benefits for both races"); *id.* ("Questions have been raised as to the ability or desirability of school districts implementing all-black academies in order to improve educational performance.").[15]

It should be clear that academic freedom does not lose its status as an important freedom through adherence to the equality guarantee of the Fourteenth Amendment.[16]

[15] An academic freedom exception to the Fourteenth Amendment would also permit academic grounds to justify differential treatment on the basis of other invidious classifications. *See, e.g., United States v. Virginia*, 518 U.S. 515, 535 (1996) (state-supported school argued that interest in "diversity" of educational choices should permit all-male admissions policy).

[16] The first explicit mention of academic freedom in this Court's cases was by Justice Douglas in his dissenting opinion in *Adler v. Board of Education*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting). In that opinion and in subsequent ones that he either authored or joined in, very broad expression is given to the importance and scope of the right

(Continued on following page)

The range of factors that a university may constitutionally consider in selecting its students (or faculty) is virtually infinite. Particularly as academic freedom has been recognized as an *intellectual* freedom, there is no limit to the viewpoints, perspectives, ideas, character traits, talents, and experiences that a university might properly consider in assembling its community. But our Constitution places "no value" on race discrimination. *See Runyon*, 427 U.S. 761. It forbids it when practiced or sponsored by the states. Enforcement of the constitutional command that state-sponsored universities not discriminate on the basis of race or ethnicity in student admissions does not impair any genuine interest in academic freedom. But a rule that would recognize the right of educational institutions to consider race and ethnicity in the exercise of academic freedom would vitiate the "core purpose" of the Fourteenth Amendment. *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

C. Although the Court has not since *Bakke* directly addressed whether diversity can be a compelling interest, its precedents demonstrate why it is not one. The Court already has rejected significant parts of Justice Powell's

of academic freedom. *See, e.g., Whitehill v. Elkins*, 389 U.S. 54, 59-60 (1967); *Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (opinion of Frankfurter, J., joined by Douglas, J., concurring in the judgment); *Presidents Council District 25 v. Community Sch. Bd.*, 409 U.S. 998, 999-1000 (1972) (opinion of Douglas, J., dissenting to denial of petition for certiorari). Yet it is instructive that Justice Douglas wrote powerfully about the evils of racial considerations in the university admissions process. *See DeFunis v. Odegaard*, 416 U.S. 312, 333-34 (1974) (Douglas, J., dissenting from the Court's decision to remand the case on mootness grounds) ("Once race is a starting point educators and courts are immediately embroiled in competing claims of different racial and ethnic groups that would make difficult, manageable standards consistent with the Equal Protection Clause."); *id.* at 334 ("Minorities in our midst who are to serve actively in our public affairs should be chosen on talent and character alone, not on cultural orientation or leanings.").

analysis. Justice Powell did not view the difference between a "plus" system and a "set aside" system as simply the difference between a race-conscious system that is narrowly tailored and one that is not. Rather, he concluded that "a facial intent to discriminate" does not "exist[ ] in an admissions program where race or ethnic background is simply one element – to be weighed fairly against other elements – in the selection process." *Bakke*, 438 U.S. at 318 (opinion of Powell, J.). In such a system, "good faith would be presumed," *id.* at 318-19, there would be "a presumption of legality and legitimate educational purpose," *id.* at 319 n.53, and "there is no warrant for judicial interference in the academic process," *id.*

The absence of an intent to discriminate when race is used as a factor is inconsistent with modern equal protection analysis. This Court has made clear that the consideration of race, even if considered along with other factors, constitutes the kind of intentional discrimination that requires strict scrutiny. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring in the judgment) ("This Court's decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual."). Surely a system like the University's, which gives a set number of points to applicants for being members of an "underrepresented" minority but also gives points to applicants for other characteristics, reflects an "intent to discriminate" as that term is now used in equal protection jurisprudence. It treats similarly-situated applicants from different races differently. *See also Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1249 (11th Cir. 2001) (invalidating as unconstitutional an undergraduate admissions system that granted a fixed number of points for race and ethnicity and other factors).

So, too, the presumption of good faith that Justice Powell attributed to school administrators is simply inconsistent with the notion that strict scrutiny must be applied to the use of race. One of strict scrutiny's key

features is "skepticism," *Adarand Constructors, Inc.*, 515 U.S. at 223-24, *i.e.*, the bedrock proposition that all official actions that treat a person differently on account of race or ethnicity are inherently suspect. Even the University here has conceded throughout the course of this litigation that "strict scrutiny" applies to its consideration of race. While it has asked for deference to its judgment from the courts, based upon Justice Powell's words, that deference simply cannot be reconciled with strict scrutiny. *See id.* at 236 (strict scrutiny requires a "detailed examination, both as to ends and as to means"); *id.* (strict scrutiny requires "the most searching judicial inquiry"). *See also J.A. Croson Co.*, 488 U.S. at 500 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice."); *id.* at 493 (opinion of O'Connor, J.) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

When the strict-scrutiny analysis employed by the Court's precedents in other contexts is applied to the rationale asserted by the University, it becomes clear that an interest in diversity cannot be a compelling one justifying racial preferences in student admissions. Like the role model theory in *Wygant*, an interest in diversity has "no logical stopping point." *Wygant*, 476 U.S. at 275 (plurality opinion). Because it bears no relationship to *any* remedial interest, there are no principled limits on its scope or duration. Tied instead (as the University urges) to the academic discretion and judgments of those who will impose the classifications, a recognized compelling interest in promoting diversity is limited only by the different kinds of racial diversity that educational institutions might seek to achieve. On such a footing, the interest is one that is not subject to any objective, uniform standards, and the preferences effectively become immune from meaningful judicial review. Its recognition would set loose a "potentially far-reaching principle disturbingly at odds

with our traditional equal protection doctrine." *Metro Broadcasting, Inc.*, 497 U.S. at 613 (O'Connor, J., dissenting).

Measuring the logical consequences of a recognized compelling interest in diversity demonstrates why it is that "[m]odern equal protection doctrine has recognized only one [compelling] interest [for racial classifications]: remedying the effects of racial discrimination." *Id.* at 612. An interest in diversity "is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications." *Id.* Moreover, the test of time has proven the essential truth of the proposition that "[u]nless they are strictly reserved for remedial settings, [racial classifications] may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *J.A. Croson Co.*, 488 U.S. at 493 (opinion of O'Connor, J.).

It is no satisfactory answer to the foregoing objections to argue that promoting diversity will produce "educational benefits". It certainly can be assumed that remedying the lingering effects of societal discrimination would produce benefits both in the educational system and throughout society generally. As discussed above, a "role model" theory for assigning teachers is premised precisely on the ground that it would produce educational benefits. *See Wygant*, 476 U.S. at 315 (Stevens, J., dissenting) ("In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty."). But the reasons that make those interests not "compelling" ones for purposes of justifying racial classifications are the same kinds of reasons that preclude a determination that "diversity" is a compelling interest. *See also Grutter*, 288 F.3d at 788-95 (Boggs, J., dissenting) (discussing and dismissing the claim that the purported educational benefits of diversity make it a compelling interest).

The University's articulation of the diversity rationale throughout this case reveals how malleable the interest is. The University often defends the interest on the basis that

it is an antidote for the lingering effects of societal discrimination. Hence, it points to patterns of segregation in housing, and elementary and secondary education, for example, as justification for race-based admissions at the university level. *See, e.g.*, Final Brief of Appellees 36 (July 30, 2001). At oral argument on the motions for summary judgment, the University's counsel made explicit reference to the "educational challenge" presented by "segregation" in various areas of society. Record 204, Tr. 34-35, Cir. App. 4163-64. The University and some of its *amici* have also touted diversity for the benefits accruing to students *after* they have graduated from college. These arguments demonstrate that there is no principle that confines the interest to the education context. If accepted as compelling, an interest in diversity could become a justification for using race to treat people differently in many walks of life.

D. 1. In the lower courts, the University has argued that in the intervening years since *Bakke* was decided, it has become accepted as "settled law" that diversity is a compelling interest in educational admissions and that colleges and universities generally have relied and acted accordingly on this proposition in considering race and ethnicity in admissions. *See* Final Brief of Appellees 2 (July 31, 2001). The argument is false for several reasons. First, it is a question-begging exercise that tries to assign *stare decisis* effect to a case not by analyzing what the case actually decided, but instead by accepting *one* view of how *some* have interpreted it.

Second, this Court has never given *stare decisis* effect, much less "extra" *stare decisis* effect, to the views of one Justice not joined by any other member of the Court. As already discussed, *see* discussion *supra* at 32-33, all nine current Justices (the majority in the 1995 decision in *Adarand v. Pena* and the dissenters in *Alexander v. Sandoval*) have recognized that there was no coherent rule supporting the use of race in college admissions emerging from *Bakke*. From the outset, both courts and academics have questioned whether Justice Powell's discussion of "academic freedom" and "diversity" in *Bakke* was binding

precedent. *Peters v. Moses*, 613 F. Supp. 1328, 1335 (W.D. Va. 1985) ("I do not believe that Justice Powell's concurring opinion represents the court's opinion in *Bakke* with regard to this matter."); Drew S. Days, III, *Minority Access to Higher Education in the Post*-Bakke *Era*, 55 U. COLO. L. REV. 491, 492 (1984) (noting that "no other Justice joined in [Justice Powell's] opinion" and "there was no opinion of the Court . . . ").

Third, a question of law can hardly be said to be considered "settled" when the lower courts are riven with disagreement on it. *See* Pet. 21-22 (discussing cases in which courts have disagreed on *Bakke* and the status of Justice Powell's opinion, or have expressed reservations, skepticism, or uncertainty about whether an interest in diversity can justify racial preferences).

Fourth, as already discussed, *see* discussion *supra* at 37-39, Justice Powell's *Bakke* opinion has already been superseded in significant ways. Accordingly, the fundamental doctrinal foundations upon which his analysis stood – that explicit racial considerations could be considered "facially nondiscriminatory" and that certain governmental actors are entitled to deference when using race – has been eroded to the point where it has been, at least implicitly, "left . . . behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992).

In light of all the foregoing, surely our nation's leading colleges and universities, employing able in-house counsel and outstanding constitutional scholars, could not have been deluded into believing that whether diversity is a compelling interest justifying racial preferences in admissions was a matter free from doubt.

2. Apart from whether any reliance was justified, it is also far from accurate to say that the University has "relied" on Justice Powell's articulated formulation for the proper consideration of race and ethnicity in admissions. A viewing of the facts in this and other reported cases arising in similar contexts leads to the conclusion that Justice Powell's opinion has been used instead as a cover

to employ all manner of potent racial preferences. Many educational institutions seem to act as if simply describing their admissions programs in language employed by Justice Powell (*e.g.*, "racial or ethnic origin is but a single though important element" considered in achieving diversity, or race and ethnicity are just a "plus" factor in the process, *Bakke*, 438 U.S. at 315, 317 (opinion of Powell, J.)), is enough to immunize them from successful attack. Thus, in this case alone, the University invokes the usual words to defend admissions policies that have at various times employed reserved seats, racially segregated waiting lists, guidelines on admission that on their face call for different admission outcomes based on race and ethnicity, and automatic assignment on the basis of race of a large enough number of fixed points to accomplish what the discriminatory grids formerly did.

The University of Georgia has used Justice Powell's formulations to defend its undergraduate admissions systems, which contain similarities to the one at issue here. As recently as 1990-1995, the University of Georgia had an undergraduate admissions policy that had certain minimum qualifications (relating to SAT scores and high school GPA) that differed depending upon whether the applicant was black or non-black. *See Wooden v. Board of Regents of Univ. of Georgia*, 247 F.3d 1262, 1265 (11th Cir. 2001); *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1240 (11th Cir. 2001). It changed the system in 1995 to one where, at the second stage of the appraisal process (after the admission and rejection of candidates based solely on academic characteristics), applicants mechanically received .5 points for self-designating as non-caucasian and .25 points for being male (with a score below 5 being sufficient for admission). *Johnson*, 263 F.3d at 1241 (noting that the files were not read at the second stage, but processed based upon data requested by the application form). Not surprisingly, these admissions systems were found to be unlawful by the Eleventh Circuit. *Id.* at 1254-64.

Prior to 1992, and prior to being sued, the University of Texas Law School had a system that placed applicants

in one of three categories: presumptive admit, presumptive deny, and discretionary zone. The standards applied to African Americans and Mexican Americans for placement in these categories were dramatically lower than for all other candidates, to the point where the presumptive admit standard for those preferred races was lower than the presumptive deny standard for the non-preferred candidates (primarily whites, Asians, and other Hispanics). The law school color-coded the application files to reflect the applicant's race, reviewed the applications of preferred race candidates with a separate minority admissions subcommittee, and maintained waiting lists segregated by race. Texas defended all of these practices as legitimate under Justice Powell's rationale in *Bakke*. *See Hopwood v. Texas*, 78 F.3d 932, 935-38 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); *id.* at 963; *id.* at 966 (Weiner, J., concurring) (finding the system "virtually indistinguishable from quotas").

In "relying" on Justice Powell's opinion for support of their racial preferences, sometimes universities do not even take care to ensure that precise forms found *illegal* in *Bakke* are not copied. The University of Washington School of Law successfully invoked Justice Powell's words to defend a system in effect in 1994 whereby all students with certain "index scores" (composites of LSAT scores and GPA) were sent to an admissions committee for comparative evaluation with other files; but minority candidates were evaluated separately by the Admissions Coordinator. *Smith v. University of Washington, Law School*, Civ. No. C97-335Z, slip op. at 18 (W.D. Wash. June 5, 2002). In the case pending before this Court involving the University of Michigan's Law School, the law school until 1992 had a program of racial preferences called, like Davis, a "special admissions program." On its face, the policy had a "goal" or "target" of enrolling 10-12% of the class from designated racial and ethnic minority groups ("Black, Chicano, Native American, and mainland Puerto Rican"). In defending its admissions policies under a subsequent written policy adopted in 1992, the law school clearly has sought to

disown the "special admissions program," which it operated long after *Bakke* had been decided. *See* Final Reply Brief of Appellants 26 & n.11 (vehemently arguing against the assertion of the plaintiff in that case that the policy adopted in 1992 incorporated prior policies; "the 1992 policy eliminated the Law School's previous policies"), filed in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir.), *cert. granted*, 123 S. Ct. 617 (2002) (No. 02-241).

Elementary and secondary schools have also invoked Justice Powell's analysis to defend large racial preferences in the assignment of students to schools. The City of Boston used a formal set-aside (as always, obligingly called "flexible") to allocate seats on the basis of race and ethnicity to the popular "Boston Latin School." *Wessmann v. Gittens*, 160 F.3d 790, 793-94 (1st Cir. 1998); *id.* at 800 (holding policy unconstitutional because it effectively foreclosed competition for some seats based solely on race or ethnicity). The Arlington County Virginia School Board used a statistically weighted lottery to make school assignments on the basis of race. *See Tuttle v. Arlington Cty. Sch. Bd.*, 195 F.3d 698, 701-03 (4th Cir. 1999); *id.* at 705 (holding systems unconstitutional on narrow-tailoring grounds). The Montgomery County Maryland Public Schools devised a "diversity profile," with assignment of students into one of several formal "categories" determined by racial and ethnic characteristics. *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 126-27 (4th Cir. 1999); *id.* at 131-34 (holding preferences unconstitutional on narrow-tailoring grounds).

The cases discussed above are confined only to those that have been litigated, where discovery has allowed the hidden to be revealed in a manner that is not otherwise "immediately apparent to the public," *Bakke*, 438 U.S. at 379 (opinion of Brennan, J.), when an educational institution states generally that its use of race and ethnicity in admissions is designed to achieve "diversity" in the manner approved by Justice Powell. But it should be clear that educational institutions have run unrestrained with the use of racial preferences purported to implement only what Justice Powell authorized. This is not reliance. It is

licentiousness. In the manner that educational institutions like the University have applied their racial preferences, Justice Powell's rationale is not even recognizable.

The emphasis on race (and, at the University of Georgia, gender) in these policies demonstrates also that *intellectual* diversity is hardly their goal. Indeed, when writing for journals and law reviews, many academics candidly admit that their school's interest in diversity is primarily to avoid legal challenge. Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 34 (2002) ("many of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds"); *id.* at 28 ("even today when defenders of affirmative action use diversity rhetoric in order to avoid legal pitfalls, the heart of the case for affirmative action is unquestionably its capacity to remedy the current effects of past discrimination"); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) ("Everyone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued. (Why no preferences for fundamentalist Christians or for neo-Nazis?)"); Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979) ("I have yet to find a professional academic who believes the primary motivation for preferential admission has been to promote diversity in the student body for the better education of all the students. . . . "); Samuel Issacharoff, *Law and Misdirection in the Debate over Affirmative Action*, 2002 U. CHI. LEGAL F. 11, 18 (2002) ("I have never heard the term seriously engaged on behalf of a Republican, a fundamentalist Christian, or a Muslim."); Alan M. Dershowitz & Laura Hanft, *Affirmative Action And The Harvard College Diversity-Discretion Model: Paradigm Or Pretext*, 1 CARDOZO L. REV. 379, 407 (1979) ("The raison d'etre for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of 'diversity' demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically

controversial goals. In recent years, it has been invoked – especially by professional schools – as a clever post facto justification for increasing the number of minority group students in the student body.").

The use of diversity or academic freedom as a legal rationale suggests that colleges and universities have "relied" on Justice Powell's opinion only in the sense that they have "relied" on it as a defense when they are sued (and none too successfully at that). In fact, the use of "diversity" as a rationalization has led to the diminution of integrity in our institutions before the nation and even before this Court. *See* Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L. J. 669, 675 n.14 (1998) ("I remain embarrassed by the claim, not of my authoring but with my name attached nonetheless, that appeared in our reply brief in support of certiorari in *Hopwood* . . . [that] argued that race operated as simply one of many criteria that went into a selection process – a claim that could not be substantiated by the record and did not comport with the reality of how affirmative action works.").

Ultimately, what history and the cases bear out is that there is no workable way to employ Justice Powell's framework for the consideration of race and ethnicity in educational admissions. To say that race may be "weighed fairly" or considered "competitively" is to say that there is no real standard at all because it is tied only to the subjective interpretations of those who employ it as the measure for what is permissible. Although not unambiguously set forth in his opinion, a common understanding of Justice Powell's analysis is that race may be used in a modest or "tie-breaking" way. *See, e.g., Grutter*, 288 F.3d at 817-18 (Gilman, J., dissenting). That common understanding simply does not reflect reality. *See* Issacharoff, 59 OHIO ST. L. J. at 676 ("*Bakke* had an unrealistic sense of the extent to which race-consciousness is required even to achieve the Harvard minimum floor of minority representation."). So too, at one time it was even suggested that a program for considering race in the manner suggested by Justice

Powell "contain[ed] the seed of its own termination." *Metro Broadcasting, Inc.*, 497 U.S. at 596 (referring to the "Harvard admissions program discussed in *Bakke*"). At this juncture in our history, what is all too clear is that the opposite is true. To permit race to be used as a reason for achieving diversity is much more likely to forever "delay the time when race will become a truly irrelevant, or at least insignificant, factor." *Adarand Constructors, Inc.*, 515 U.S. at 229.

III. The Interests Proffered by the Intervenors Cannot Justify the University's Racial Preferences.

The district court correctly rejected the separate arguments of the intervenors offered in support of the University's racial preferences. These interests are remedial ones that the district court correctly concluded did not motivate the preferences. Pet. App. 72a-76a. For that reason alone, they could not be compelling interests justifying the preferences. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). Moreover, the intervenors did not point to any identified discrimination by the University as a basis for imposing racial preferences. Instead, they relied on a generalized history or accounts of incidents or circumstances unrelated to admissions policies or practices, many of them remote in time, sometimes dating back decades or longer. Pet. App. 76a-81a. The history evoked by the intervenors is indistinguishable from societal discrimination, which the district court was right to conclude could not justify the racial preferences. *Id.* at 84a-85a. The same is true with respect to intervenors' contentions regarding an alleged hostile racial climate on campus. *Id.* at 85a-86a.

Finally, the intervenors have sought to justify the preferences on the basis of other allegedly discriminatory criteria used by the University in admissions. They made no effort to explain how the preferences for race were related to compensating for other factors considered in the admissions

process, and it is not surprising that they would bear no such relationship, since the University did not devise the preferences on this basis. Moreover, as the district court concluded, if the University employs criteria actually having a discriminatory impact on members of some racial or ethnic groups, the narrowly-tailored remedy is the removal of the discriminatory criteria, not the addition of a suspect racial classification. *Id.* at 88a. The use of racial preference would not diminish liability in any event for other discriminatory criteria. *Connecticut v. Teal*, 457 U.S. 440 (1982).

IV. The University's Preferences Violate 42 U.S.C. § 1981.

Petitioners' proof that the University has engaged in intentional discrimination also establishes a violation of 42 U.S.C. § 1981. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 383-91 (1982). Although its text, written in the aftermath of the Civil War, suggests that only non-whites are its intended beneficiaries, the Court has held that the statute prohibits discrimination against whites to the same extent as others. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96 (1976). Under § 1981(c), the statute's substantive rights are protected from impairment under color of state authority.

A contract for educational services is a "contract" for purposes of § 1981. *Runyon v. McCrary*, 427 U.S. 160, 172 (1976). The racial discrimination practiced by the Law School in admissions is a "classic violation of § 1981." *Id.*

The University does not offer admission on an "equal basis" to members of all races. *Id.* On the contrary, as the district court found and the foregoing discussion elaborates, the Law School applies different standards in admission based on race and ethnicity. Section 1981 contains no exceptions to its rule of nondiscrimination. It does not provide, for example, that claimed interests in "diversity" or "academic freedom" excuse unequal treatment on the basis of race under the statute. Indeed, the Court has

specifically rejected a number of asserted defenses to the statute based on the exercise of constitutional rights. *Id.* at 175-79 (rejecting defenses based on the First Amendment rights of freedom of association, parental rights under the Due Process Clause of the Fourteenth Amendment, and the right of privacy). *See also* discussion *supra* at 34.

CONCLUSION

For the foregoing reasons, petitioners respectfully request this Court to reverse the judgment entered in favor of the University respondents on petitioners' claims for violations of the Equal Protection Clause, Title VI, and 42 U.S.C. § 1981, and to direct entry of judgment on liability in favor of petitioners on those claims and to remand the case with further proceedings consistent with this Court's opinion.

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